No. 83-707

In The

Supreme Court of the United States

October Term, 1983

FRANK L. TODD, et al., each in his respective capacity as Trustee of the OPERATING ENGINEERS HEALTH AND WELFARE FUND, et al., etc.,

Petitioners,

vs.

BENAL CONCRETE CONSTRUCTION COMPANY, INC., a California corporation,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Statement of the Facts

Respondent BENAL CONCRETE CONSTRUCTION COMPANY, INC. ("BENAL")[1] is a contractor engaged

1 This is BENAL'S original Designation of Corporate Relationships. BENAL is not owned by any parent corporation. BENAL does not have an ownership interest in any subsidiaries, nor does BENAL have any affiliates.

in the business of trenching foundations and pouring concrete slabs for houses and subdivisions in San Diego County, California. BENAL is signatory to a Master Labor Agreement ("MLA") with the International Union of Operating Engineers, Local Union No. 12 ("UNION"). Since BENAL does not own trenching machinery nor have employees qualified to perform the trenching work, it contracts out the trenching portion of its work to independent contractors called trenchers. BENAL contracts with one of the four trenchers in San Diego County each of whom are capable of performing the work. Of the four trenchers involved, one is a partnership composed of two brothers, the other three are sole proprietorships. Each of these trenchers have a substantial investment in equipment and storage facilities. Although dues paying union members, these entrepreneurs prefer to work independently and by doing so have elected to forego union benefits. They have consistently refused to become employees of any contractor or to be put on any contractor's payroll as an employee. Nor can the Union force the trenchers to incorporate or become employees of other contractors.

BENAL is faced with a situation where the trenchers have chosen to act as independent contractors. As such, they have elected not to participate in union benefits. Faced with its inability to control its own members, the Union has turned to exerting secondary pressure on BENAL through the trusts.

The secondary pressure is brought to bear through the terms of the MLA. The MLA contains various clauses dealing with owner-operators and subcontractors which purport to make BENAL responsible for the actions of the

independent trenching contractors. These clauses themselves are a scheme by which the unions, through the trust funds, are attempting to circumvent the restrictions of federal labor law.

Proceedings Below

The Plaintiff trustees filed suit in the Central District of California on July 19, 1979, seeking unpaid fringe benefit contributions from *January 1, 1970* forward for hours worked or paid to BENAL's employees covered by the MLA.

The parties filed cross-motions for summary judgment based on a statement of stipulated facts. The stipulated facts contained all of the elements that led the District Court to conclude as a matter of law that the trenchers are independent contractors. The Court then granted summary judgment in favor of BENAL holding that the Labor-Management Relations Act ("LMRA") barred payment by BENAL on behalf of the trenchers.

On appeal, the Ninth Circuit affirmed the summary judgment below holding that no true employment relationship existed between BENAL and the independent trenchers despite the language of the MLA; and, that contributions on behalf of independent contractors who are not employees are barred by § 302 of the LMRA. The Ninth Circuit, in considering whether or not the subcontracting clause applied to the partnership/independent contractor, did not address that issue because it was not argued to the District Court.

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SUMMARY OF ARGUMENT

The Ninth Circuit correctly ruled that contributions on behalf of independent contractors who choose not to become employees are barred by § 302(c) (5) of the Labor-Management Relations Act of 1947. Claims arising under the subcontracting clause of the Master Labor Agreement were not properly raised below. The claims should also not be reviewed by this Court because the subcontracting clause is inapplicable when an independent contractor's employees are Union members who choose to work outside the confines of the Master Labor Agreement.

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REASONS WHY THE WRIT SHOULD BE DENIED

I.

Neither The Decision Below Nor The Record Raises Important Reasons For Review Or A Conflict With State Or Federal Cases Warranting Review By This Court

A writ of certiorari should be granted only when there are special and important reasons for granting the writ. None are present in this case.

The Ninth Circuit Court of Appeals properly ruled that a contractor cannot be required to make fringe benefit contributions on behalf of independent contractors in that they are not employees of the contractor. The Ninth Circuit's decision below is in harmony with well-established federal law that prohibits payments to trust funds

by an employer on behalf of persons who are not his employees. *Walsh v. Schlecht,* 429 U.S. 401, 97 S.Ct. 679 (1977); Labor-Management Relations Act of 1947 § 302(c) (5) [29 U.S.C. § 186(c) (5)].

In addition, there is no conflict between the decision below and that of the Tenth Circuit in *Trustees of Teamsters, Etc. v. Hawg-N-Action, Inc.,* 651 F.2d 1384 (10th Cir. 1981), *cert. denied,* 455 U.S. 941, 102 S.Ct. 1433-34 (1982), as claimed by petitioners. In *Hawg-N-Action,* there was no clause which required the contractor to put owner-operators on the contractor's payroll as employees. Here, that requirement was express in the MLA. In *Hawg-N-Action,* there was no question that the independent contractors and their employees would not benefit from the contributions. Here, the benefit to the employees from the contribution is express. The Court below was concerned with the requirement of treating an independent contractor as an employee. It decided one could not be both an employee and an independent contractor, an issue not raised in *Hawg-N-Action.*

Well established under federal law is the rule that § 302 prohibits payments to trust funds by an employer *on behalf of* persons who are not his employees. *Walsh v. Schlecht,* 429 U.S. at 408. Therefore, as the Ninth Circuit held, there must exist a true employer/employee relationship before payments to trust funds are permitted. If BENAL were to put the trenchers on its payroll, the trenchers would in fact and law remain independent contractors. As stated by the Ninth Circuit, contractual language alone is not sufficient to transform the relationship from that of independent contractor to that of em-

ployer/employee. Nothing in the stipulated facts suggests that if the formal requirements of the MLA were followed, the substantive nature of BENAL's relationship to the owner-operators would change. Given the stipulated facts in this case, an independent contractor, by any other name, remains an independent contractor and *not* an employee. It follows that § 302 prohibits payments by BENAL *on behalf of* the trenchers.

II.

The Trustee's Claims Under The Subcontracting Clause Should Not Be Reviewed By This Court

The Ninth Circuit correctly refused to review the trustee's claims under the subcontracting clause on the basis that the claims were not argued below. The issue is not raised in the pleadings, in the District Court's findings of fact and conclusions of law, nor in the Ninth Circuit opinion. See, *Trustees of Teamsters, Etc. v. Hawg-N-Action,* 651 F.2d at 1388. Assuming the claim has been preserved for appeal, it is not one which this Court should review. The law, as applied to the particular facts of this case, requires the same conclusion as that reached by the Ninth Circuit.

In *Moglia v. Geoghegan,* 403 F.2d 110 (2nd Cir. 1968), *cert. denied,* 394 U.S. 919, 89 S.Ct. 1193, the Court held that the only payments which may be legally made or accepted by the trusts are payments made by persons who are signatory to a written trust agreement. In this case, neither the trenchers nor their employees have executed an agreement with the trusts. Furthermore, BENAL cannot make contributions on their behalf because the trenchers and their employees are not employees of BENAL.

The subcontracting clause of the MLA is intended to penalize the use of subcontractors employing non-union employees. The cases permitting payment to the trusts under a subcontracting clause are based on the rationale that the contributions are merely "measured by" the hours worked by non-union employees. *Walsh v. Schlecht,* 429 U.S. 401, 97 S.Ct. 679 (1977). Here, each of the workers are union members. In their self-employment they have effectively chosen not to have payments made to the trusts. BENAL is powerless to affect those decisions. By requiring union members on the job site, despite their independence as a contractor, BENAL has met the intent of the subcontracting clause.

CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The Ninth Circuit Court of Appeals correctly held that, given the stipulated facts, BENAL was entitled to prevail as a matter of law. Therefore, BENAL respectfully requests that the Petition for a Writ of Certiorari be denied.

DATED: January 26th, 1984.

Respectfully submitted,

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